

DECISION
TALBOT COUNTY BOARD OF APPEALS
Appeal No. 22-1741

Pursuant to due notice, a public hearing was held by the Talbot County Board of Appeals (“the Board”) at the Bradley Meeting Room, Court House, South Wing, 11 North Washington Street, Easton, Maryland, beginning at 6:30 p.m. on Monday, November 7, 2022, on the Administrative Appeal Application (“Application”) of Elise Davis, owner of 5489 Rude Avenue, and Karen Allen, owner of 5447 Rude Avenue, Tilghman, MD 21671 (“the Appellants”). On August 15, 2022, the Appellants had filed an Administrative Appeal of a decision by the Talbot County Short Term Rental Review Board (“the STRRB”), pursuant to Talbot County Code (“the Code”) Chapter 190 (Zoning), Article VII, § 190-63.4(B), and Chapter 20, § 20-6, contending that the STRRB erred by granting a short-term rental license to Clem, LLC (“Clem”) for its property located at 5467 Rude Avenue, Tilghman, MD 21671, in the Resource Conservation – Critical Area Overlay District. Clem’s property is shown on Talbot Tax Map 44, at Grid 16, Parcel 31, Lots 3 and 4.

Present at the hearing for the Board of Appeals were Frank Cavanaugh, Chairman, Louis Dorsey, Jr., Vice-Chairman, and Paul Shortall, Zakary A. Krebeck, and Jeffrey Adelman, Members. Cynthia L. McCann, Esq., served as attorney for the Board. Staff members present were Brennan Tarleton, Planning Director, Bryce Yelton, Planner II, Mike Duell, Chief Code Compliance Officer, and Christine Corkell, Board Secretary. Anne C. Ogletree, Esq., represented the Appellants. Brendan Mullaney, Esq., of McAllister, DeTar, Showalter & Walker, represented the property owner, Clem. Andrew C. Meehan, Esq., of MacLeod Law Group, represented the STRRB.

The Chairman inquired whether all Board members had visited the site individually. He received affirmative responses from each member. Mr. Cavanaugh then requested that those planning to give testimony be identified and sworn.

Before the Board were the following Exhibits:

Exhibit 1. Application for Administrative Appeal;

Exhibit 2. Notice of Intent to Participate, submitted by Elise Davis and Karen Allen;

Exhibit 3. List of Witnesses to be Summoned;

Exhibit 4. Tax Map;

Exhibit 5. Notice of Public Hearing for Advertising;

Exhibit 6. Newspaper Confirmation;

Exhibit 7. Notice of Public Hearing with List of Adjacent Property Owners attached;

Exhibit 8. Sign Maintenance Agreement, with attached photo of sign posted on property;

Exhibit 9. STR Decision No. STN-22-2;

Exhibit 10. Clem LLC Parking Exhibit;

Exhibit 11. Aerial Photo a portion of a zoning map (Black and White Copy);

Exhibit 12. Map with Measurements;

Exhibit 13. Floor Plans (3 pages);

Exhibit 14. Notice of Intent to Participate by Andy Meehan, Esq.;

Exhibit 15. Notice of Intent to Participate, by Brendan Mullaney, Esq.;

Exhibit 16. Certificate of Service from Elise Davis;

Exhibit 17. Motion to Dismiss or for Alternative Relief, from Andrew Meehan, Esq.;

Exhibit 18. Request for Immediate Dismissal of Administrative Appeal from Brendan Mullaney, Esq.;

Exhibit 19. Photos from Mike Duell, 3 pages;

Exhibit 20. Pre-Hearing Statement from Brandan Mullaney, Esq. received 10/28/22;

Exhibit 21. Pre-Hearing Statement from Andy Meehan, Esq. received 10/28/22;

Exhibit 22. Letter from Leslie Steen, received 11/07/22;

Exhibit 23. Letter from Thomas Geary, received 11/07/22;

Exhibit 24. Letter from Monica Otte, received 11/07/22.

Also before the Board were the following motions, all filed on November 7, 2022, prior to the hearing:

1. Appellants' Motion to Continue;
2. The STRRB's Response in Opposition to Motion to Continue;
3. Clem's Prehearing Statement (in Opposition to the Motion to Continue);
4. The STRRB's Motion to Strike Letters from the General Public.

Procedural History

On May 5, 2022, Clem applied to the STRRB for a short-term rental license for its property at 5467 Rude Avenue in Tilghman. The STRRB held a public hearing on the application on June 9, 2022 and voted to grant a short-term rental license to Clem. The STRRB issued its written decision on July 14, 2022.

Appellants filed their Application with the Board on August 15, 2022 (“the Appeal”). The Board set a hearing for November 7, 2022. Accordingly, Code § 20-14.A required the Appellants to submit an original and five copies of a prehearing statement no later than October 7, 30 days prior to the November 7 hearing.

Clem and the STRRB filed their respective Notices of Intent to Participate on August 24, 2022.

On October 25, 2022, Clem filed a Request for Immediate Dismissal of the Appellants’ Appeal, and the STRRB submitted a Motion to Dismiss or for Alternative Relief. Clem requested that the Appeal be dismissed due to the Appellants’ failure to adhere to the requirements of Code §§ 20-7.C and 20-14.A. The STRRB sought dismissal on the grounds of the Appellant’s failure to timely file a prehearing statement in compliance with Code §§ 20-14.A(1)-(8). Alternatively, the STRRB requested that the Board refuse to accept documentary evidence and prohibit the testimony of any witness who had not been identified by the Appellants.

In accordance with Code § 20-14.B, which required them to do so no later than seven days prior to the November 7 hearing, Clem and the STRRB filed their respective prehearing statements on October 28, 2022.

On November 7, 2022, the Appellants moved the Board to continue the matter until the first available date after Thanksgiving and to inform the County that it should be represented by independent counsel at any continued hearing. The reasons for the continuance request were that the Appellants had not given their counsel any information regarding the Appeal until November 3, 2022, and that Appellants’ counsel had insufficient time to correct the record or prepare for the hearing.

Also on November 7, 2022, Clem and the STRRB each opposed the request by filing a Prehearing Statement (in Opposition to the Motion to Continue) and a Response in Opposition to Motion to Continue, respectively. The STRRB also filed a Motion to Strike Letters from General Public.

Preliminary Motions—Summary of Arguments

STRRB's and Clem's Motions to Dismiss

At the outset of the hearing, the Chairman acknowledged the Board's receipt of motions to dismiss filed by the STRRB and Clem. He opened the floor to Messrs. Meehan and Mullaney to argue their respective motions.

In the Motion to Dismiss or for Alternative Relief, the STRRB moved the Board to dismiss the Appeal on grounds that the Appellants had failed to timely file a prehearing statement "no later than 30 days prior to the Board's public hearing," pursuant to Code § 20-14.A, and that the prehearing statement failed to contain the following required elements:

- (1) Citation to the section of the County Code authorizing the Board to hear and decide the application;
- (2) Citations to all ordinances, rules, and regulations upon which the Appellant relies;
- (3) All facts upon which the application is based;
- (4) All documentary evidence upon which the Appellant relies;
- (5) A summary of all expert opinions to be offered;
- (6) The area of expertise and qualifications of all expert witnesses;
- (7) Identity of all witnesses who will testify; and
- (8) Estimated time for presentation.

Code § 20-14.A(1)-(8).

Mr. Meehan argued that, although experts (items (5) and (6)) were not relevant in this Appeal, citations to all ordinances and rules (items (1) and (2)), all facts upon which the appeal would be based (item (3)), all documentary evidence upon which the Appellants would rely (item (4)), and the identification of all witnesses (item (7)), were critical for the STRRB (and Clem) to understand how to prepare for the hearing. Code §§ 20-7.C and 20-14.A.

Mr. Meehan contended that the STRRB had filed and served its own extensive prehearing statement, as required by § 20-14.B, and so, it would be profoundly unfair to permit the Appellants to proceed without having followed the Board's same mandatory, not permissive, Rule. Mr. Meehan urged that, even if his request for dismissal were denied, the Appellants should at least be limited to presenting only the information contained in their Application.

Next the Board heard from Mr. Mullaney on behalf of Clem, the recipient of the short-term rental license from the STRRB. In its Request for Immediate Dismissal of Administrative

Appeal No. 22-1741, Clem argued that, in addition to the prehearing statement requirements under Code § 20-14.A, the Appellants had failed to adhere to Code § 20-7.C(1)-(3), or to Code § 20-7.C(4)(a) and (b) which requires:

- (4) The following materials and information need not be submitted with the application but an applicant shall be submitted no later than 30 days prior to the public hearing:
 - (a) All documents, records, and exhibits that the Appellant intends to rely upon at the public hearing.
 - (b) A summary of what the Appellant expects to prove, including the names of the Appellant's witnesses, summaries of the testimony of expert witnesses, and the estimated time required for presentation of the Appellant's case...

Code §§ 20-7.C(4).

Mr. Mullaney argued that Appellants had ample time – 84 days – to understand the Code's requirements for administrative appeals and to engage counsel, if they were so inclined, noting that one of the Appellants is an attorney. Mr. Mullaney submitted that the fact that Ms. Ogletree had only just obtained the Appellants' documentation did not constitute legal grounds for a continuance, and that Clem would be unfairly prejudiced if the Board allowed the Appeal or granted a continuance. Citing the Appellants' failure to provide any significant and material evidence or testimony upon which they might mount arguments before the Board, Mr. Mullaney requested dismissal of the Appeal as permitted by Code § 20-14.E.

The Board then heard Ms. Ogletree on the Appellants' response to the motions to dismiss. She suggested that, to her knowledge, the Board has always taken into account that parties do not really know what requirements they must meet when they decide to come before the Board, and that it had never seemed to matter whether parties are attorneys or not. She submitted that she knew the Board had heard cases earlier in the year involving an attorney who had built in the Critical Area but claimed no knowledge of the Critical Area law.

Ms. Ogletree argued that the requirements of the Board are both statutory and common sense. Suggesting that she did not want to assign any blame to the Board's Clerk, Ms. Corkell, she explained how the Appellants interpreted a certain document they had filled out to be a prehearing statement. Ms. Ogletree explained that Ms. Corkell had given the Board copies of "one page from what Ms. Davis filed." Ms. Ogletree then handed to the Board, Mr. Meehan, and Mr. Mullaney copies of what she referred to as "the second page." She suggested to the Board "if you look at the second page ... of this document which was filed on August 15, it is what

Ms. Davis thought was a statement of a prehearing statement.” The page Ms. Ogletree gave the Board contained the heading “Notice of Public Hearing for Advertisement” (referred to here as “the Page” or “the Form”). Ms. Ogletree asserted that Ms. Davis listed on the Form “all the things” she had thought were inappropriate at the STRRB hearing, and that she included some citations.

Ms. Ogletree suggested that the Page is not what she, or Ms. Corkell, or the Board, would expect to see, but that it was an attempt by Ms. Davis to comply with the law, and that because it was filed on August 15th, it fell well within the required 30 days prior to the hearing. Ms. Ogletree submitted that because Ms. Corkell had treated the Page as a worksheet, as she has always done, it was never sent to Clem, the STRRB, or the Board. Ms. Ogletree asserted that she did not believe the Board has ever exalted form over substance, and that the substance, here, was the Appellants’ intent to comply with Code requirements. She conceded that the Form was incorrect and not what she or Ms. Corkell had ever been used to seeing, and that neither Mr. Meehan nor Mr. Mullaney had seen the Form until the hearing.

Ms. Ogletree also acknowledged that she, herself, did not know until the morning of the hearing that the Appellants had submitted the Form. She argued that the Appellants attempted to comply with the letter of the law, but unfortunately the Form they presented was incorrect. She represented that she had moved for a continuance because the Appellants could correct their submission within a very short time.

The Board heard again from Mr. Meehan in rebuttal. He confirmed he had not seen the Form before the hearing. He argued that it would be prejudicial to his client to be expected to address it and requested that the Board reject it as a prehearing statement.

In turn, Mr. Mullaney pointed out that the Form’s title was “Notice of Public Hearing for Advertisement” and not “Prehearing Statement.” He also observed that the Form, as completed by the Appellants, did not contain detailed grounds upon which the Appeal was based or the requisite citations to specific deficiencies in Clem’s application to the STRRB, upon which the STRRB had relied in approving Clem’s short-term rental license. He concluded that the Form was insufficient to constitute a prehearing statement, and reiterated Clem’s request for the Board to dismiss the Appeal.

Appellants' Motion to Continue

The Board permitted Ms. Ogletree to respond to Mr. Mullaney before hearing her on the Appellants' Motion to Continue. Ms. Ogletree countered that there was enough information contained in the "Notice of Public Hearing for Advertisement" – allegations that Clem's site plan was insufficient, and that due process had been denied at the STRRB hearing – to permit the parties to understand the grounds of the Appeal. In the interest of justice, Mr. Ogletree argued the Appellants should be given a continuance, and so should the STRRB and Clem, she added, in order to permit the Appellants to supplement their prehearing statement with the appropriate language.

The Board then heard from Mr. Meehan in response to Ms. Ogletree. He acknowledged receiving the Appellants' Motion to Continue the morning of the Board hearing, and stated that he responded at approximately 3:30 p.m. He submitted that the continuance request was untimely because the prehearing statement was due 30 days prior to the hearing. Mr. Meehan argued that the issues raised by the Appellants regarding an alleged attorney conflict and unspecified constitutional issues were moot given the Board's representation by Ms. McCann. Mr. Meehan requested that the Board deny Appellants' Motion to Continue.

Replying to Mr. Meehan, Ms. Ogletree reminded the Board of a time when Mr. Shortall was Chairman and there were active ongoing concerns about constitutional issues. The County Attorney at the time required that whenever a constitutional issue arose in a zoning matter, the County Attorney be present to protect the County's interests. Ms. Ogletree went on to argue that she was more concerned about fundamental justice, fairness, and due process, explaining that Clem had been permitted to amend its application at the STRRB hearing but, she alleged, the STRRB did not afford sufficient time for anyone to review the amendment. She concluded by asserting that the Appellants had tried, albeit imperfectly, to comply with Code requirements, that they attempted to file a prehearing statement, and that they were prepared to supplement it in a timely manner.

Board member Adelman, referring to the "Notice of Public Hearing Advertisement" paper Ms. Ogletree had submitted, asked whether the Form was included in the entire application package filed on August 15th. He also asked Ms. Ogletree whether she included the Form as a justification and reason for a continuance in the Appellants' Motion to Continue. Ms. Ogletree responded that the Form was included in the Motion to Continue in the sense that the Appellants

had raised a constitutional issue regarding whether they were given adequate opportunity at the STRRB hearing to respond to the amendments to Clem's application for a short-term rental license. She reiterated that the Appellants had attempted to comply with the Board's prehearing statement requirements, and said that, until the morning of the Board's hearing, she was not aware that Ms. Corkell had in fact received the "Notice of Public Hearing for Advertisement" form as it had been filled out by the Appellants on August 15, and that Ms. Corkell, understandably, had not recognized it to be the Appellants' prehearing statement.

Mr. Adelman asked whether Ms. Ogletree learned about the Form after she had filed her Motion to Continue before noon of the hearing. She responded in the affirmative: she had already filed the Appellants' Motion to Continue before she learned of the Form.

The Chairman commented that the Board's Administrative Appeal Application and Administrative Appeal Guidance Document are available on the County's website. The Guidance Document, which lists requirements and deadlines, is what appellants use to file their Administrative Appeal documents. He added that the Form Ms. Ogletree handed to the Board is clearly titled "Notice of Public Hearing Advertisement" and says, "Define Specific Request." He did not see how that Form could be confused with what Code § 20-14.A requires for a prehearing statement.

Ms. Ogletree responded that under Code § 20-14, the prehearing statement must contain the facts supporting the reason for the hearing which, in this case, was Clem's noncompliance with what the Appellants believed to be the applicable statute. She offered that the Appellants included the Code citation to the statute on the Form which, she argued, should have been enough. She posited that the Form, as filled out by the Appellants, is what a lay person would, and the Appellants did, consider to be a prehearing statement.

Mr. Dorsey asked whether Ms. Ogletree's client was a licensed attorney, to which Ms. Ogletree responded that only one of her clients was a lawyer, albeit one who does not practice in the area of land use law. Referring to the Motion to Continue in which the Appellants alleged that Ms. Ogletree had not been retained or given any information until November 3, Mr. Dorsey pointed out that the Appellants had sufficient time to retain counsel and submit a proper prehearing statement, given that their Appeal was filed on August 15.

Ms. Ogletree responded that this Appeal was like the Foam Works, LLC case in which the Board continued the hearing so that the attorney would have an opportunity to fix the record.

Mr. Dorsey countered that he was not certain the circumstances of that case were the same or whether the continuance there was based on prehearing statements timely submitted to the Board and in the correct form. Ms. Ogletree asserted that there were similarities between Foam Works and this Appeal in that, in both, a lot of material was submitted in advance of the hearing.

STRRB's Motion to Strike

Next, the Board turned its attention to the STRRB's Motion to Strike Letters From General Public. Mr. Meehan identified Board Exhibits 22-24 as having been received by Ms. Corkell the morning of the hearing, all of which were from various persons opposed to Clem's Short Term Rental license. He cited Code § 190-63.2.H which provides that all appeals to the Board from a decision of the STRRB shall be on the record. He argued that Exhibits 22-24 amounted to testimony from the public, and the time for consideration of such letters was at the STRRB level. Ms. Ogletree responded that Exhibits 22-24 were duplicative because the information contained in them was presented to the STRRB.

Turning back to the Appellants' Motion to Continue, Mr. Adelman noted that it raised several arguments: the timing of when counsel was retained; the legal representation of the STRRB and the Board; and the constitutional issues cited in paragraph 3 of the Motion. Ms. Ogletree clarified that the constitutional issue was one of due process which required notice that something was going to be filed at the STRRB hearing, and an opportunity for the public to comment on it.

Mr. Adelman asked whether, in addition to the arguments for continuance that he identified, the Appellants were adding a new ground which was that they had attempted to comply with the filing requirements for an Administrative Appeal. Ms. Ogletree responded in the affirmative.

In response to Ms. Ogletree's explanation that the constitutional issues concerned due process and fairness at the STRRB hearing, Mr. Meehan argued that none of that was explained in the Motion to Continue, and he had no idea what constitutional issues were being raised.

At that point, the Chairman stated that he had questions for the Board's attorney and wanted to get clarification on points brought up by both sides. Mr. Shortall moved to go into executive session, seconded by Mr. Adelman. The Board voted unanimously to go into a closed session to obtain legal advice.

Finding of Fact and Conclusions of Law

The Board reconvened following the closed session. On the Appellants' Motion to Continue, the Board made the following findings as a matter of law and fact:

(1) that the Appellants' request was more like a request for a postponement rather than a continuance under Rule 8.A;

(2) that the Appellants had ample time and opportunity to hire legal counsel, from August 15 when they filed their Appeal, until November 3 when they retained Ms. Ogletree;

(3) that the "Notice of Public Hearing for Advertisement" Form that Ms. Ogletree's claimed constituted a prehearing statement and an attempt by Appellants' to comply with the requirements of Code § 20-14.A was not included in the Appellant's Motion to Continue but was instead presented to the Board, Clem, and the STRRB, for the first time, at the hearing;

(4) that the Board's requirements for an Administrative Appeal are clear, provided to appellants when an appeal is filed, and are otherwise made available and clearly articulated to the public on the County's website in the Administrative Appeal Guidance Document;

(5) that even were the Board to accept the "Notice of Public Hearing for Advertisement" form as the Appellants' prehearing statement, it did not comply with Code § 20-14.A which defines the requirements for a prehearing statement;

(6) that to accept the Form at the hearing, in lieu of a prehearing statement, would be a precedent that the Board does not want to set;

(7) that to continue the hearing, thereby granting the Appellant additional time to prepare a correct prehearing statement, would be unfair to Clem which was issued a short-term rental license by the STRRB on July 15, 2022; and,

(8) that the Appellants had sufficient time to put their information in proper form but failed to do so.

For these reasons, Mr. Shortall moved to deny the Appellants' Motion to Continue. Mr. Krebeck seconded, and the Board voted 4-1 (Jeff Adleman voted against) that the Appellants' Motion to Continue be denied.

Next the Board considered Clem's and the STRRB's motions to dismiss. As a matter of law and fact, the Board found:

(1) that the Appellants failed to comply with the specific requirements set forth in Code § 20-14.A(1) through (8);

(2) that the Appellants had sufficient time, beginning from August 15 when the Appeal was filed, to retain counsel to prepare the prehearing statement in accordance with those requirements and within the required time frame (30 days prior to the hearing);

(3) that pursuant to Code § 20-14.E, the Board has the discretion to dismiss an application for administrative appeal which fails to comply with the requirements of Code § 20-14.A.

For these reasons, Mr. Dorsey moved to grant the motions to dismiss, seconded by Mr. Shortall. The Board voted unanimously to grant Clem's Request for Immediate Dismissal of Administrative Appeal No. 22-1741 and the STRRB's Motion to Dismiss or for Alternative Relief.

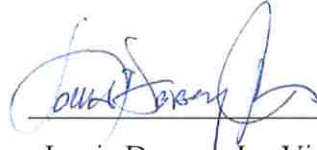
The Appeal having been dismissed; it was not necessary for the Board to decide the STRRB's Motion to Strike Letters from the General Public.

IT IS THEREFORE, this 6th day of December, 2022, ORDERED, by unanimous decision of the Talbot County Board of Appeals, that the Appellants' Motion to Continue be and hereby is DENIED, and that Clem's Request for Immediate Dismissal of Administrative Appeal No. 22-1741 and the STRRB's Motion to Dismiss or for Alternative Relief be and hereby are GRANTED, and that, accordingly, Appellant's Administration Appeal Application No. 22-1471 appealing the STTRB's July 14, 2022 decision granting a short-term rental license to Chem, LLC be and hereby is DISMISSED.


TALBOT COUNTY BOARD OF APPEALS



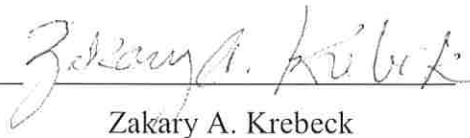
Frank Cavanaugh, Chairman



Louis Dorsey, Jr., Vice-Chairman



Paul Shortall



Zakary A. Krebeck



Jeffrey Adelman